

ORIGINAL

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**In the Matter of**

**Petition For Rulemaking Of The
Telecommunications Resellers Association
To Eliminate Comity-Based Enforcement Of
Other Nations' Prohibitions Against The
Uncompleted Call Signaling Configuration
Of International Call-back Service**

RM 9249

**REPLY OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.405(b) of the Commission's Rules, 47 C.F.R. § 1.405(b), hereby responds to oppositions filed by a single foreign government¹ and a small handful of foreign carriers² (collectively, the "Foreign Opponents") to TRA's pending request for initiation of a rulemaking proceeding to rescind all remaining comity-based prohibitions against, and to reverse the Commission's current policy of enforcing, the laws of other nations prohibiting, the provision of international call-back service utilizing uncompleted call signaling ("TRA Petition").

¹ See Opposition of Public Service Regulatory Commission of the Republic of Panama ("Panama").

² See Oppositions of Cable & Wireless, plc ("C&W"), Costa Rican Institute of Electricity ("CRIE"), Philippine Long Distance Telephone Company, Inc. ("PLDT"), Telkom SA Limited ("Telkom SA").

OJY

I.

INTRODUCTION

In its Petition, TRA pointed out that much has changed since the Commission, at the request of a handful of foreign governments and based on an expansive view of international comity, reluctantly agreed to enforce the laws of other nations prohibiting the provision of international call-back service using uncompleted call signaling. Most critically, TRA emphasized, the United States and 68 of its trading partners entered into the Agreement on Basic Telecommunications under the auspices of the World Trade Organization (the "WTO Basic Telecom Agreement")³ and based on the market-opening commitments embodied therein, the Commission adopted an "open entry policy" for carriers based in WTO countries, which allowed such carriers to freely enter and compete with U.S. carriers in the U.S. telecommunications market.⁴ In light of this newly-adopted "open entry policy," TRA argued, no cognizable policy justification exists for Commission recognition or enforcement of foreign laws -- including laws prohibiting the provision of international call-back service using uncompleted call signaling or any other innovative international service alternatives -- intended to restrain U.S. carriers from entering telecommunications markets either in countries which have not committed to allow competitive entry or which have committed to open their markets, but have failed to do so.

Noting that the Commission has long recognized that innovative international service alternatives such as international call-back service further the public interest by fostering competition

³ Incorporated into the General Agreement on Trade in Services ("GATS") by the Fourth Protocol to the GATS, April 30, 1996, 36 I.L.M. 366 (1997).

⁴ Rules and Policies on Foreign Participation in the U.S. Telecommunications Market (Report and Order and Order on Reconsideration), 12 FCC Rcd. 23891 (Nov. 26, 1997).

and driving down rates in the international telecommunications market, TRA emphasized that the uncompleted call-signaling configuration of international call-back service offers one of the few vehicles by which U.S. carriers can enter otherwise closed foreign markets. Certainly, TRA argued, the Commission, having made the policy judgment to fully and immediately honor its WTO commitments, should not assist other countries which have not done so in enforcing market entry barriers against the provision of the one service that can be provided on a competitive basis despite the efforts of foreign monopoly providers to insulate their home markets from competition. In short, TRA argued, the Commission should no longer allow itself to act as an unwitting accomplice of those who seek to thwart its procompetitive global policies by offering foreign interests a convenient forum for enforcing prohibitions against international call-back service.⁵ The time has come, TRA declared, to rescind all remaining comity-based prohibitions against the provision of international call-back service utilizing uncompleted call signaling, allowing providers of this and other innovative international service alternatives to compete in the international telecommunications market unshackled by now unwarranted, comity-based deference to anticompetitive foreign laws.

In opposing TRA's Petition, the Foreign Opponents raise a number of objections, none of which is meritorious. For example, the Foreign Opponents claim that the circumstances

⁵ Indeed, TRA noted that the Commission's comity-based enforcement policies may actually hinder pro-competitive, consumer-oriented initiatives within countries which currently seek to thwart competition by prohibiting international call-back service. TRA explained that by allowing foreign governments and foreign monopoly providers of telecommunications services to utilize its enforcement mechanisms to perpetuate bans on the provision of international call-back service, the Commission is providing a forum free of the legal and/or political pressures that might otherwise be brought to bear at home. Accordingly, TRA argued that not only should "foreign governments which have decided to outlaw uncompleted call signaling bear the principal responsibility for enforcing their domestic laws," but they should also have to deal with the legal and political fallout from these anti-competitive restrictions. VIA USA, Ltd., 10 FCC Rcd. 9540, ¶ 50 (1995) ("Call-Back Reconsideration Order").

justifying the Commission's adoption of its comity-based policy of enforcing, at the request of foreign governments, the laws of other nations prohibiting the provision of the uncompleted call-signaling configuration of international call-back service have not changed sufficiently to warrant reversal of this policy. It is further claimed by the Foreign Opponents that reversal of the Commission's comity-based enforcement policies would have adverse international repercussions and hinder the Commission's efforts to foster global telecommunications competition. Finally, it is argued variously by the Foreign Opponents that the Commission's comity-based enforcement policies are either working well or not being used, and therefore, need not, and should not, be eliminated. TRA strongly disagrees on all counts.

II.

ARGUMENT

A. The Foreign Opponents Miss The Point In Contending That Circumstances Have Not Dramatically Changed For U.S. Carriers Since The Commission Reluctantly Agreed To Enforce The Laws Of Other Nations Prohibiting The Uncompleted Call Signaling Configuration of International Call Back Service

The Foreign Opponents argue that TRA is mistaken in urging that competitive circumstances have changed dramatically since the Commission reluctantly agreed in 1995 to enforce the laws of other nations prohibiting the provision of international call-back service using uncompleted call signaling. In so asserting the Foreign Opponents contend that there is "no logical nexus between the WTO Agreement and TRA's requested rulemaking;"⁶ indeed, it is asserted by the

⁶ Comments of C&W at 5.

Foreign Opponents that the WTO Agreement has actually "magnified the importance of international comity."⁷ The Foreign Opponents have simply missed the point.

Initially, TRA has not relied upon the WTO Basic Telecom Agreement alone in arguing that competitive circumstances have changed since the Commission adopted the comity-based enforcement policies applicable to the uncompleted call signaling configuration of international call-back service three years ago. The more critical occurrence from TRA's perspective is the Commission's "adopt[ion of] rules . . . opening the U.S. market to competition from foreign companies."⁸ As TRA emphasized in its Petition, given the Commission's "open entry standard for WTO Member country applicants," foreign carriers may now freely enter, and compete with U.S. carriers in, the U.S. telecommunications market.⁹ Moreover, the presumption in favor of authorizing foreign carriers from all WTO Member countries to enter and compete in the U.S. telecommunications market applies regardless of whether a particular WTO Member country has made satisfactory market opening commitments *or any such commitments at all*.¹⁰ Thus, from the perspective of U.S. carriers which must now face additional competition from foreign carriers while

⁷ Comments of Telkom SA at 6.

⁸ Rules and Policies on Foreign Participation in the U.S. Telecommunications Market (Report and Order and Order on Reconsideration), 12 FCC Rcd. 23891 at ¶¶ 2, 29.

⁹ Id. at ¶ 2. The Foreign Opponents correctly point out that only carriers from WTO member countries may freely enter and compete in the U.S. telecommunications market. While carriers from non-WTO member countries must still satisfy the effective competitive opportunities ("ECO") test to enter the U.S. telecommunications market, it would make little sense to eliminate comity-based enforcement of WTO member countries' prohibitions against international call-back service, while affording access to Commission enforcement mechanisms to nations which have made no market-opening commitments whatsoever.

¹⁰ Id. at ¶¶ 37 - 38.

still being denied access to the home markets of many of those carriers, circumstances have changed dramatically since 1995.

To U.S. carriers, it matters little that various WTO members have committed to open their markets over time; U.S. carriers are facing increased competition from foreign carriers *now*. As the Commission is aware, many signatories of the WTO Basic Telecom Agreement have made "limited . . . or no commitments" to open their markets to U.S. carriers.¹¹ In fact, only "25 countries . . . [will] meet the ECO requirements by 2000, and 39 countries . . . [will] do so in total by the time the WTO commitments are effective in 2013."¹² Carriers from these nations thus have, and will retain for many years, a competitive advantage over U.S. carriers not "because of any superior business acumen, responsiveness to customers, or technological innovation, but because of . . . protected status in . . . [their] home market[s]."¹³ Commission enforcement of foreign laws prohibiting the uncompleted call signaling configuration of international call-back service would only serve to exacerbate this unfair competitive advantage.

B. Comity-Based Enforcement of Foreign Prohibitions Against International Call-Back Service Using Uncompleted Call-Signaling Is Neither Consistent With Nor Furthers The Market-Opening Objectives Of The WTO Basic Telecom Agreement

The Foreign Opponents' suggestions that Commission comity-based enforcement of foreign prohibitions on international call-back service utilizing uncompleted call signaling is consistent with, and indeed, furthers the market-opening objectives of, the WTO Basic Telecom

¹¹ Id. at ¶¶ 33, 37.

¹² Id. at ¶ 36.

¹³ Market Entry and Regulation of Foreign-Affiliated Entities (Report and Order), 11 FCC Rcd. 3873, ¶ 15 (1995), *recon. pending*.

Agreement are simply wrong. By opening its telecommunications markets to competitive entry by foreign carriers based in WTO countries, the Commission fully and completely honored its obligations under the WTO Basic Telecom Agreement. It has done so immediately and with virtually no reservations. It need do no more; assisting countries which have not promptly opened their markets to competitive entry in enforcing remaining market entry barriers would be antithetical to the market-opening objectives of the WTO Basic Telecom Agreement.

The Commission justified its unilateral opening of U.S. telecommunications markets on the ground that "increased competition in global markets will increase pressure on all WTO Members to liberalize their telecommunications markets, including those that have made no commitments or limited commitments."¹⁴ In adopting an "open entry policy," the Commission legitimately expected that, like "foreign carriers [that] will begin to enter and compete in the U.S. market," U.S. carriers will "likewise be able to enter and compete in previously closed foreign markets."¹⁵ The Commission may, and should, utilize all available tools to ensure that U.S. carriers are in fact permitted to enter previously closed foreign markets.

Actions taken to foster global telecommunications competition (not actions taken to insulate foreign markets from competition) are consistent with, and further the market-opening objectives of, the WTO Basic Telecom Agreement. As the Commission has recognized "new technologies, alternative routing options, and settlement rate reform" should all be used to "increase the pressure to liberalize and support competition."¹⁶ Thus, as the Commission has previously

¹⁴ Rules and Policies on Foreign Participation in the U.S. Telecommunications Market (Report and Order and Order on Reconsideration), 12 FCC Rcd. 23891 at ¶¶ 38, 39.

¹⁵ Id. at ¶ 12.

¹⁶ Id. at ¶ 43.

confirmed, U.S. carriers should be "encouraged] . . . to provide" international call-back service using uncompleted call-signaling as a means to increase "competitive pressures in foreign markets."¹⁷

As the Commission has recognized, "[t]he WTO Basic Telecom Agreement seeks to replace the traditional regulatory regime of monopoly telephone service providers with procompetitive and deregulatory policies."¹⁸ Maintenance of the status quo and retention of market entry barriers are not consistent with procompetitive and deregulatory policies.

C. Elimination Of The Commission's Comity-Based Policy Of Enforcing Foreign Prohibitions Against International Call-Back Service Using Uncompleted Call-Signaling Will Not Have Adverse International Repercussions

The Foreign Opponents' assertions that elimination of the Commission's comity-based enforcement of foreign prohibitions against international call-back service using uncompleted call-signaling will have adverse international repercussions are grossly overstated. First, as TRA pointed out in its Petition, neither the United States nor any other WTO member nation has any obligation under International Telecommunications Regulations to "enforce any provision of the domestic law or regulation of any other Member."¹⁹ As the Commission explained, "foreign governments . . . [can]not, simply by enacting domestic legal, regulatory, or procedural measures, require the United States to implement such measures as a matter of international law."²⁰ Indeed, as TRA again

¹⁷ Policy Statement on International Accounting Rate Reform, 11 FCC Rcd. 3146, ¶ 20 (1996).

¹⁸ Rules and Policies on Foreign Participation in the U.S. Telecommunications Market (Report and Order and Order on Reconsideration), 12 FCC Rcd. 23891 at ¶ 2.

¹⁹ Call-Back Reconsideration Order, 10 FCC Rcd. 9540, ¶ 47 (1995).

²⁰ Id.

emphasized in its Petition, even the resolution on alternate calling services passed at the 1994 International Telecommunications Union ("ITU") Plenipotentiary Conference in Kyoto recognized that comity requires only that "member states having jurisdiction over a call-back provider whose operations infringe another member state's laws inquire into the matter and take such actions *as may be appropriate within the constraints of its national law.*"²¹

To date, the Commission has been willing to accommodate foreign governments by enforcing prohibitions on the uncompleted call-signaling configuration of international call-back service even though such prohibitions are antithetical to U.S. policy objectives and express public interest findings of the Commission. Such accommodation was an extraordinary gesture made at a time when the U.S. telecommunications market, like the telecommunications markets of the rest of the world, was not fully open to competitive entry by foreign carriers. Now the U.S. market is fully open to carriers from countries which have committed to open their markets now or in the future. In light of the Commission's "open entry policy," an expansive view of international comity broad enough to provide for Commission enforcement of foreign laws designed to exclude U.S. carriers can no longer be justified.²²

Obviously, there are limits to the doctrine of comity. "[F]rom the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of

²¹ Id. at ¶ 48 (emphasis added).

²² The Foreign Opponents are correct that comity is generally a "two-way street." With respect to international call-back service, however, the street has run only in one direction, as the Commission has heretofore been willing to enforce foreign laws prohibiting international call-back service using uncompleted call signaling, while countries imposing such prohibitions have shown no willingness to recognize the Commission's findings that such innovative international service alternatives generally further procompetitive goals to the benefit of U.S. consumers and industry.

the forum are vitiated by the foreign act."²³ As noted above, prohibitions against the provision of international call-back service using uncompleted call signaling are contrary to U.S. policy objectives and express public interest findings by the Commission. Hence, there can be no legitimate expectation of comity-based enforcement by the Commission of such prohibitions.

Obviously, other nations remain free to enforce their respective prohibitions against international call-back service. TRA has not urged the Commission to force other nations to accept the U.S. view of the uncompleted call-signaling configuration of international call-back service. TRA has proposed only that other nations not be able to avail themselves of the Commission's processes to enforce anticompetitive statutory and/or regulatory restrictions on U.S. carriers. Given that the Commission has always held that "foreign governments which have decided to outlaw uncompleted call signaling bear the principal responsibility for enforcing their domestic laws,"²⁴ declining to assume that responsibility far from a serious affront to the sovereignty of other nations.

D. The Heretofore Limited Use Of The Commission's Comity-Based Enforcement Mechanisms Against Providers of International Call-Back Service Using Uncompleted Call-Signaling Does Not Justify Retention Of These Mechanisms

The Foreign Opponents variously argue that the Commission's comity-based enforcement policies are either working well or not being used, and therefore, need not, and should not, be eliminated. The Foreign Opponents are correct that foreign governments have made limited use of the Commission's comity-based enforcement mechanisms, but are wrong in the conclusions that they draw from this assessment. TRA submits that the heretofore limited use of the

²³ Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984) (emphasis added).

²⁴ Id. at ¶ 50.

Commission's comity-based enforcement mechanisms argue for their elimination as proposed by TRA.

Initially, the limited use made by foreign governments of the Commission's comity-based enforcement mechanisms (as well as the limited participation by foreign governments in this proceeding) strongly suggest that the adverse international repercussions predicted by the Foreign Opponents are unlikely to emerge. Second, the more extensive participation by foreign carriers in this proceeding suggests that the Commission's processes will likely be used more frequently in the future by foreign monopoly carriers to insulate their home markets from competitive entry. PLDT, one of the Foreign Opponents, has already availed itself of the Commission's processes in an effort to do just that.²⁵

More critically, Commission willing to enforce anticompetitive foreign laws in the context of the uncompleted call-signalling configuration of international call-back service establishes a dangerous precedent. As technology expands and develops and new services emerge and proliferate, efforts by foreign monopoly providers to hinder competitive entry will diversify. Certainly, the Commission would not want a well-intentioned comity-based enforcement scheme developed to address international call-back services at a time when global telecommunications markets were not open to competitive entry to serve as a basis for schemes to block the growth of, for example, internet services.

Finally, TRA strongly disagrees with C&W's suggestion that the Commission would be unable to avoid contention complaint proceedings involving international call-back service even

²⁵ See, e.g., Philippine Long Distance Telephone Co. V. USA Link, L.P., d/b/a USA Global Link (Memorandum Opinion and Order), 12 FCC Rcd. 12,010 (1997), *pet. for rev. pending*.

if it were to grant the relief requested here by TRA. If the Commission eliminates, as TRA has recommended, all remaining comity-based prohibitions against, and reverses its policy of enforcing the laws of other nations prohibiting, the provision of international call-back service utilizing uncompleted call signaling, no claim could be brought before the Commission by a foreign government regarding the provision of international call-back services within its borders over which the Commission would have jurisdiction..

III.

CONCLUSION

By reason of the foregoing and the matters addressed in its pending Petition, the Telecommunications Resellers Association respectfully requests that the Commission initiate a rulemaking proceeding to rescind all remaining comity-based prohibitions against, and reverse its policy of enforcing the laws of other nations prohibiting, the provision of international call-back service utilizing uncompleted call signaling.

Respectfully submitted,

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May 22, 1998

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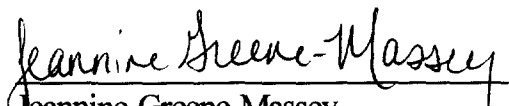
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